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April 26, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.E. 03-121, NSTAR Electric Standby Rate Tariffs

Dear Secretary Cottrell:

Enclosed for filing please find an original and thirteen (13) copies of the Opposition of Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company to the Motion to Dismiss of the New England Distributed Generation Coalition, the Division of Energy Resources, the Conservation Law Foundation and the Joint Supporters.

Thank you for your attention to this matter.

Very truly yours,

David S. Rosenzweig

Enclosures

cc: William Stevens, Hearing Officer
John Cope-Flanagan, Hearing Officer
Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company Cambridge Electric Light Company Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 03-121

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing documents upon the service list in the above-docketed proceeding in accordance with the requirements of 220 C.M.R. 1.05.

Stephen H. August, Esq.
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Dated: April 26, 2004

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company Cambridge Electric Light Company Commonwealth Electric Company	)	D.T.E. 03-121

OPPOSITION OF BOSTON EDISON COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY AND COMMONWEALTH ELECTRIC COMPANY TO MOTION TO DISMISS OF THE NEW ENGLAND DISTRIBUTED GENERATION COALITION, THE DIVISION OF ENERGY RESOURCES, THE CONSERVATION LAW FOUNDATION AND THE JOINT SUPPORTERS

On April 23, 2004, the New England Distributed Generation Coalition ("NEDGC"), the Division of Energy Resources ("DOER"), the Conservation Law Foundation ("CLF") and the Joint Supporters filed a motion to dismiss, or in the alternative, a motion to strike certain portions of rebuttal testimony and/or to modify the procedural schedule (the "Motion to Dismiss")[1] concerning the April 21, 2004 rebuttal testimony filed in the above-referenced proceeding by Boston Edison Company ("Boston Edison"), Cambridge Electric Light Company ("Cambridge") and Commonwealth Electric Company ("Commonwealth") (together, "NSTAR Electric" or the "Company"). For the reasons set forth below, the Motion to Dismiss is without merit and must be denied.

[1] It should be noted that this Motion to Dismiss is the second such motion filed by NEDGC in this proceeding, the first of which was submitted on February 12, 2004 and is pending.

I. INTRODUCTION

On October 31, 2003, NSTAR Electric submitted tariffs, with supporting testimony and exhibits, to the Department of Telecommunications and Energy (the "Department") for cost-based standby rates for large and medium-sized commercial and industrial customers who have their own on-site, self-generation facilities. On January 16, 2004, the Company refiled the tariffs in this docket, in order for the Department to be able to extend the period by which the effective date of the rates could be suspended. On January 29, 2004, the Department suspended the effective date of the tariffs until August 1, 2004, in order to investigate the propriety of the Company's proposed tariffs.

A public hearing and procedural conference was convened by the Department on February 10, 2004, at which time the Hearing Officer established a procedural schedule (Transcript of February 10th Procedural Conference at 89-90). The Hearing Officer's February 10th procedural scheduled called for the opportunity for NSTAR Electric to file rebuttal testimony on April 13, 2004, with evidentiary hearings to commence on April 28, 2004. Subsequently, on February 27, 2004, pursuant to a motion filed by the Western Massachusetts Industrial Customer Group ("WMICG"), WMICG sought to modify the established procedural schedule to extend the time frame for intervenors to propound discovery on the Company and to reserve the opportunity for intervenors to file rebuttal testimony regarding the prefiled direct testimony of the other distribution companies in the proceeding (i.e., Massachusetts Electric Company, Western Massachusetts Electric Company and Fitchburg Gas and Electric Light Company) (the "WMICG Motion"). NEDGC, DOER and the Joint Supporters filed responses indicating their support for the

WMICG Motion.[2] On March 12, 2004, the Hearing Officer issued a ruling on the WMICG Motion, granting intervening parties until April 8, 2004 to file rebuttal testimony[3] and setting the date of April 21, 2004 for NSTAR Electric to file rebuttal testimony. The Hearing Officer's March 12, 2004 ruling did not modify the April 28, 2004 start date for evidentiary hearings. Neither the original procedural schedule nor the modifications to that procedural schedule was appealed by any party to the proceeding, including NEDGC, DOER, CLF or the Joint Supporters.

In accordance with the established procedural schedule, NSTAR Electric timely filed its rebuttal testimony on April 21, 2004. The NSTAR Electric submittal consists of: (1) the rebuttal testimony of Henry C. LaMontagne (Exhibit NSTAR-HCL-7), with related supporting Exhibits NSTAR-HCL-8 through 10; (2) the rebuttal testimony of Charles P. Salamone (Exhibit NSTAR-CPS-1), with related supporting Exhibits NSTAR-CPS-2 and 3; and (3) the rebuttal testimony of Dr. Hethie S. Parmesano (Exhibit NSTAR-HSP-1), with related supporting Exhibits NSTAR-HSP-2 and 3. The NSTAR Electric rebuttal testimony reaffirms the positions taken in NSTAR Electric's original tariff filing on October 31, 2003 (which was refiled on January 16, 2004), and it addresses some of the concerns and criticisms offered during the course of the proceeding by various intervenor witnesses in their prefiled direct testimony. In particular, in Mr. LaMontagne's rebuttal testimony, he discusses the merits of certain minor modifications to the Company's standby rate proposal that could be adopted by the Department. These

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2 NSTAR Electric did not oppose the request to provide intervenors an opportunity to submit rebuttal testimony.

3 Despite being afforded the opportunity to file rebuttal testimony on April 8th, none of the intervening parties submitted rebuttal testimony.

modifications are either: (a) based upon errata discovered during the course of this proceeding; or (b) in response to specific arguments presented to date by intervenors. To display the effect of the modifications identified in Mr. LaMontagne's rebuttal testimony (for the benefit of the Department and all parties), illustrative tariff forms were provided in Exhibit NSTAR-HCL-10, which carry forward these potential modifications. As a matter of fact and procedure, NSTAR Electric did not submit the illustrative tariff forms provided in Exhibit NSTAR-HCL-10 separately to the Department as new tariffs filed pursuant to G.L. c. 164, § 94 or 220 C.M.R. 5.00 et seq., and it did not file new tariff fees with the Department.

Now, on the virtual eve of evidentiary hearings, NEDGC, DOER, CLF and the Joint Supporters have made the extraordinary request to dismiss the entirety of NSTAR Electric's January 16th tariff submission and to commence a new investigation into the illustrative tariffs; alternatively, NEDGC, DOER, CLF and the Joint Supporters ask the Department to disregard the established procedural schedule, strike all testimony relating to the illustrative tariff forms in Exhibit NSTAR-HCL-10 (including Exhibit NSTAR-HCL-10 itself) and to modify the existing procedural schedule (in an unspecified manner) to allow for more discovery and additional time to prepare to cross-examine the Company's witnesses. As described below, there is no legal, policy or factual basis to support the Motion to Dismiss and NSTAR Electric's April 21, 2004 rebuttal filing was timely and proper, and will be subject to continuing investigation and review by the Department during the remainder of the proceeding. The Motion to Dismiss of NEDGC, DOER, CLF and the Joint Supporters fails to demonstrate that there is anything legally impermissible about the Company's rebuttal filing that would warrant dismissal of the

entire case or drastic alteration to the long-established procedural schedule. Accordingly, the Motion to Dismiss should be denied.

II. STANDARD OF REVIEW

The Department's standard of review for ruling on a motion to dismiss is articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988) ("Riverside"). Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36, at 10 (1995) ("Cambridge/MIT"). In determining whether to grant a motion to dismiss, the Department takes the assertions of fact included in the filings and pleadings as true and construes them in favor of the non-moving party. Riverside at 26-27. Dismissal will be granted by the Department only if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id. In ruling on such a motion, the Department is also guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure. See 220 C.M.R. § 1.06(6)(c). It is fundamental that the burden on the party moving for dismissal is a heavy one. See Gibbs Ford, Inc. v. United Truck Leasing Corp., 399 Mass. 8, 13 (1987).

III. ARGUMENT

The arguments advanced by NEDGC, DOER, CLF and the Joint Supporters in their Motion to Dismiss are rooted in several misunderstandings or mischaracterizations of: (1) the established procedural schedule; (2) the Company's right to address in rebuttal testimony points raised to date in this proceeding; (3) the legal effect of the illustrative tariff forms filed with the Company's rebuttal testimony; and (4) the Department's need, pursuant to statute, to complete its investigation within the six-month suspension period. In that regard, the Motion to Dismiss is notable for its failure to assert and prove what is

necessary to justify the extraordinary relief that is requested. Nowhere in the Motion to Dismiss is it argued that the Company's rebuttal testimony is untimely or unauthorized under the procedural schedule; that the Company is not entitled to offer rebuttal testimony to support previous positions that have been challenged or, indeed, to acknowledge points that have been raised by others; that the filing of an illustrative form of tariff during the course of an ongoing proceeding carrying forward recommendations specified in rebuttal testimony is legally barred by G.L. c. 164, § 94 or Department precedent; or that the Department is not constrained in this case by the statutory six-month suspension period pursuant to G.L. c. 164, § 94 and G.L. c. 25, § 18. As shown in more detail below, the Company's rebuttal testimony was proper in all respects and it was offered to facilitate (rather than inhibit) the orderly conduct of the proceeding. Therefore, there is no basis: (i) to dismiss the Company's January 16th tariff filing; (ii) to strike portions of the Company's rebuttal testimony; or (iii) to modify the existing procedural schedule. Accordingly, the Motion to Dismiss should be denied.

A. The Company's April 21st Submittal Is Timely Filed in Accordance with the Hearing Officer's Procedural Schedule and It Constitutes Proper Rebuttal Testimony.

As stated above, from the early stages of this proceeding, it has been clear that the Company reserved the right to file rebuttal testimony in order to respond to the potential testimony of 18 intervening parties in the case.[4] The opportunity to file rebuttal testimony is also a right that is grounded in the Department's procedural regulations. See 220 C.M.R. 1.06(6)(f) ("the petitioner...shall open and close"); see also G.L. c. 30A,

[4] In actuality, nine different witnesses have submitted prefiled direct testimony in this proceeding.

§ 11(3). Thus, the established procedural schedule in the case has uniformly provided for a potential rebuttal filing by NSTAR Electric since the outset. Although the date for the Company's rebuttal testimony filing was originally set by the Hearing Officer as April 13, 2004, the date was moved to April 21, 2004, pursuant to a motion supported by the majority of parties now presenting the Motion to Dismiss. In point of fact, the Company's right to file rebuttal testimony and the date for filing such testimony has never been contested by any party to this proceeding. As such, there can be no legitimate claim by NEDGC, DOER, CLF or the Joint Supporters that the Company's filing of rebuttal testimony, per se, or the proximity of the filing to the first day of evidentiary hearings, raises an unanticipated issue or an unworkable problem with respect to preparing for hearings.[5]

Moreover, the Company's April 21st filing is proper rebuttal testimony. In fact, the Motion to Dismiss makes no assertion to the contrary. Mr. LaMontagne's rebuttal testimony supports contested elements of NSTAR Electric's proposed rate design, incorporates his recommendations for limited modifications to the January 16th tariffs (based upon the prefiled testimony of certain intervenors) and it updates the transition charge in the standby rates of Cambridge in a manner consistent with a recent

[5] Although the Motion to Dismiss tries to avoid making this claim, it does fall into the trap of asserting this as a basis for relief (see, e.g., "[t]o submit [illustrative tariffs] at the very end of the process on the eve of hearings is an abuse of the process and an effort to short-change the Department's responsibility to review and approve rates that should not be rewarded") (Motion to Dismiss at 7; see also Transcript of April 22nd Procedural Conference 20, lines 10-11).

Department order.[6] Mr. Salamone's rebuttal testimony provides the planning context describing the Company's decision making as it relates to its distribution and transmission system and distributed generation. Dr. Parmesano's rebuttal testimony addresses the ratemaking theory applicable to standby service and she responds to various claims made in the testimony of intervenor witnesses regarding standby rate design. Each of these rebuttal testimonies is classic rebuttal, responding to the arguments raised by intervenors – defending initial positions of NSTAR Electric in some instances and conceding points made by intervenors in other instances. There is no basis to assert that the Company is not entitled to offer this rebuttal testimony for the Department's consideration, nor is there a basis to claim that such legitimate rebuttal testimony should be stricken from the record or that it warrants delaying the start of evidentiary hearings.

B. The Illustrative Tariff Forms Filed With the Company's Rebuttal Testimony Do Not Represent New Tariffs Subject to Suspension Under G.L. c. 164, § 94 and G.L. c. 25, § 18.

Stripped from its rhetoric, the fundamental premise of the Motion to Dismiss is that the Company is not able to offer rebuttal testimony and supporting exhibits that illustrate in tariff form the recommendations of its witness offered in the rebuttal phase of the case. However, the Motion to Dismiss is completely unsupported in this proposition.[7]

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6 On March 26, 2004, the Department separately approved a correction to the transition charge of Cambridge that was incorrectly specified in Cambridge's approved annual transition cost reconciliation filing. Cambridge Electric Light Company, D.T.E. 03-118 (2004). This corrected transition charge was not in effect at the timing of NSTAR Electric's January 16th tariff filing in this case.

7 The only case cited in the Motion to Dismiss, Massachusetts Electric Company v. Department of Public Utilities, 383 Mass. 675 (1981) has nothing to do with the matter at issue. That case concerned a decision of the Department dismissing a rate case filing based upon a future test year and not issues of rate suspension for illustrative tariffs. Id.

Indeed, the Company's rebuttal filing is completely appropriate. In fact, in Cambridge/MIT, D.P.U. 94-101/95-36 (1995), Mr. LaMontagne filed rebuttal testimony responding to a witness presented by the Massachusetts Institute Technology, Mark Drazen. In Mr. LaMontagne's rebuttal testimony, he provided illustrative tariff language to address a claim made by Mr. Drazen. See Cambridge/MIT, at 74 (noting the illustrative tariff language presented in Mr. LaMontagne's rebuttal testimony). In certain other instances, illustrative tariffs have been noted as being used in Department proceedings, have been found to be helpful and have not triggered new suspension periods.[8] See, e.g., U.S. Sprint Communications Co., D.P.U. 90-223, at 9 (1991); see also Western Massachusetts Electric Company, D.T.E. 97-120, at 167 n.118 (1999); Commonwealth Gas Company, D.P.U. 94-123, at 3 n.4 (1994).

Although NEDGC, DOER, CLF and the Joint Supporters claim that the filing of the illustrative tariffs is objectionable, it was offered by the Company to assist the Department's and other parties' review by setting forth the specific terms that would apply to the recommendations made by NSTAR Electric's witnesses in their rebuttal testimony. To the extent that the Company is free to make the recommendations it presented in rebuttal testimony, as it is, there is no rational or legal basis to strike illustrative tariffs that carry forward those recommendations. Moreover, the Company submits that the presence of the illustrative tariffs in the record at this time places all parties in a more favorable position than if no tariffs were extant and the application of

[8] Although not the subject of a specific case citation, in numerous other instances, the Company is aware that in proceedings involving a proposed tariff, questions have been posed regarding such tariffs leading to information requests or record requests to incorporate in illustrative tariff language a potential change. See, e.g., Company Response to Information Request DTE-2-18.

the Company's rebuttal testimony in terms of tariff language were unclear. In this manner, the Department and other parties will have the full opportunity to ask questions on cross examination regarding the illustrative tariffs.[9]

Such a filing of illustrative tariffs in the context of rebuttal testimony does not constitute a new rate filing under G.L. c. 164, § 94. The Company did not file the illustrative tariffs in a separate docket under that statutory section, nor did it file the illustrative tariffs pursuant to the Department's regulations on rate filings, 220 C.M.R. 5.00 et seq. In this regard, with its rebuttal testimony, the Company did not need to make a filing fee of $100 per tariff as applies to new tariff filings. General Laws, Chapter 164, section 94 provides no bar on distribution companies filing illustrative tariffs in the context of ongoing Department proceedings, and there are no provisions in G.L. c. 164, § 94 or G.L. c. 25, § 18 that necessitate the Department suspending such illustrative tariffs.[10] Therefore, as a legal matter, there is no merit to the claim in the Motion to Dismiss.

Further, as a policy matter, imposing a prohibition on distribution companies filing illustrative tariffs setting forth the specific terms of contested positions, or to offer clarifications on matters of acknowledgement, would be an inadvisable precedent for the Department to establish. It would act as a significant disincentive to providing clarity in

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9 This is a far more preferable practice than waiting until after hearings and briefing to a compliance filing when such tariffs may otherwise appear for the first time. Indeed, if such a compliance filing of new tariffs does not trigger a new suspension period, as acknowledged in the Motion to Dismiss (Motion to Dismiss at 5), it is absurd to argue that illustrative tariffs filed before evidentiary hearings and briefing triggers a new suspension period.

10 It bears noting that, even in situations where the Department has the right to suspend tariffs, it has the discretion not to suspend rates and it may suspend rates for a period of time less than the full six-month suspension period. See Boston Gas Company v. Department of Public Utilities, 368 Mass. 51, 54-56 (1975); G.L. c. 25, § 18.

Department proceedings and would frustrate the efforts of parties to defend their positions (or even to concede certain positions) in adjudicatory proceedings on rate matters. With the illustrative tariff forms in the record, each of the moving parties on the Motion to Dismiss, as well as the Department, will be able to propound reasonable discovery questions, conduct cross examination, ask proper record requests and brief matters of concern. There is no loss of right for any party and the Company's rebuttal testimony and the illustrative tariffs will contribute to the efficient and orderly conduct of the proceeding. Accordingly, NSTAR Electric urges the Department to reject the argument presented in the Motion to Dismiss.

C. In Order for the Department To Conduct its Review Within the Applicable Six-Month Suspension Period, the Existing Schedule Must Be Maintained.

As an alternative request for relief, the Motion to Dismiss asks the Department to suspend the existing procedural schedule, and to allow parties to pose discovery questions[11] and to consider that new information before starting evidentiary hearings (Motion to Dismiss at 9). The amount of additional time sought for each of these procedural modifications is not specified in the Motion to Dismiss. This alternative request for relief is neither realistic nor feasible.[12] The press of time requires that the existing schedule be maintained.[13]

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11 The Hearing Officer has already granted parties an opportunity to conduct discovery on NSTAR Electric's rebuttal testimony (Transcript of April 22nd Procedural Conference at 29).

12 Ironically, if the Department were to strike the illustrative tariffs, it would place the intervenors in a less favorable position regarding the proposed standby rates by eliminating concessions made by NSTAR Electric as part of its rebuttal testimony.

13 Having said that, the Company does not oppose a short schedule extension of a day or two if it is deemed appropriate and the overall schedule can stay intact.

As stated above, by statute, the Department is required to issue an order on proposed tariffs within the six-month suspension period. G.L. c. 164, § 94; G.L. c. 25, § 18. Given the Company's rate filing date of January 16th, this means a Department order must be issued by July 31, 2004. Based on even a compressed briefing schedule and a reasonably tight deliberation period for the Department to consider the important issues that will be decided in the case, it is necessary that the case move forward as expeditiously as possible. It would simply not be possible to complete the remaining phases of the proceeding, including the Department preparing its final decision by July 31st, if a delay of any significant nature were to be introduced into the procedural schedule at this time. Thus, this aspect of the Motion to Dismiss should be rejected out of hand.

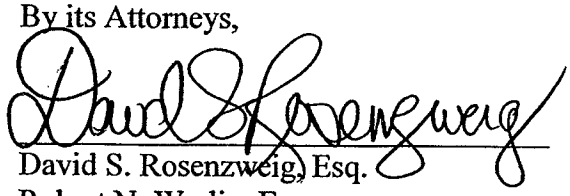
IV. CONCLUSION

For all of the foregoing reasons, NEDGC, DOER, CLF and the Joint Supporters have failed to established that the Company's January 16th filing should be dismissed, that portions of the Company's rebuttal testimony should be stricken from the record or that the existing procedural schedule should be modified. As such, the Motion to Dismiss should be denied.

Respectfully submitted,

BOSTON EDISON COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
COMMONWEALTH ELECTRIC COMPANY

By its Attorneys,



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Dated: April 26, 2004